Supreme Court, U.S.
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No.

In the Supreme Court of the United States

JOSE ANTONIO PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Neil* v. *Biggers*, 409 U.S. 188, 199-200 (1972), the Court articulated a five-factor test for assessing the reliability of eye-witness identifications. Since that time, however, scientific research has demonstrated that one of those factors—the level of certainty a witness demonstrates in his identification of a suspect—has very little correlation with the accuracy of that identification. The question presented is whether the level of an eyewitness's certainty should be removed from the list of factors to be considered in determining whether an identification made during an unnecessarily suggestive procedure is nonetheless sufficiently reliable to satisfy the requirements of due process.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jose Antonio Perez, respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit issued two opinions in Mr. Perez's appeal of his criminal conviction, which are reported at *United States* v. *Perez*, 414 F.3d 302 (2d Cir. 2005) (addressing the interstate facility jurisdictional requirement in the federal murder-for-hire statute) (App., *infra*, 1a-6a) and *United States* v. *Perez*, 138 Fed. Appx. 379 (2d Cir. 2005) (App., *infra*, 7a-10a). The District Court's opinion ruling on Mr. Perez's motion to suppress eyewitness identification evidence is reported at *United States* v. *Perez*, 248 F. Supp. 2d 111 (D. Conn. 2003) (App., *infra*, 11a-21a).

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2005. On October 5, 2005, Justice Ginsburg, as Circuit Justice for the Second Circuit, granted an extension of time within which to file a petition for writ of certiorari until November 10, 2005 (No. 05A300). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall * * * deprive any person of life, liberty, or property without due process of law * * *.

STATEMENT

Petitioner Jose Antonio Perez, who has steadfastly maintained his innocence, was convicted of participating in a

murder-for-hire, and sentenced to life in prison. Eyewitness identification testimony was central to the government's case. Mario Lopez, a participant in the crime who cooperated with the government in exchange for an agreement not to seek the death penalty against him, told the government that the person who paid for the killing was an auto-shop owner with dark skin. Nearly six years after the crime was committed, Lopez was shown a photo array. The array consisted of photographs of eight individuals. Only one of the subjects—petitioner—had dark skin, and Lopez identified him as the auto-shop owner who had paid for the murder.

Although the government conceded that in fact petitioner was not the auto shop's owner—his brother, who was tried separately for the crime, was—the government sought to support its claim that petitioner had some involvement in the crime by introducing Lopez's out-of-court identification of petitioner. (Lopez did not make an in-court identification.)

After a *Wade* hearing,[1] the district court found that "the use of Jose Antonio Perez's dark-skinned photograph juxtaposed with all other markedly lighter faces resulted in an identification procedure that was unduly suggestive." App., *infra*, 14a. The district court nonetheless found the suggestive out-of-court identification reliable under this Court's decision in *Neil* v. *Biggers*, 409 U.S. 188, 199-200 (1972), which established a five-factor test for assessing the reliability of identifications. Applying the *Biggers* analysis, the court found that Lopez's certainty in his identification and his opportunity to view the suspect weighed in favor of the reliability of the identification and counterbalanced the suggestiveness of the array and the lengthy time between the crime and the identification. App, *infra*, 15a-20a. (The court

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[1] See *United States* v. *Wade*, 388 U.S. 218 (1967) (mandating hearings to determine whether a witness's identification of a defendant has been tainted by unnecessarily suggestive procedures and is inadmissible).